Hastings International and Comparative Law Review

Volume 33
Number 2 *Summer 2010*

Article 7

1-1-2010

HIV-Based Claims for Protection in the U.S. and U.K.

Ruly Tafzil

HIV-Based Claims for Protection in the U.S. and the U.K.

By RULY TAFZIL*

> I tell you, you can do nothing. Have you not troubles enough of your own? I tell you there are thousands such in Johannesburg. And were your back as broad as heaven, and your purse full of gold, and did your compassion reach from here to hell itself, there is nothing you can do.[1]

I. Introduction

In its most basic terms, asylum and refugee law is about protection. It is a response to the belief that persons who are threatened, who will likely suffer great harm at no fault of their own, should be protected. It is a belief that has manifested itself repeatedly throughout history, from the cities of refuge established by Moses,[2] to the temple sanctuaries of ancient Rome,[3] to the international instruments of protection at work today.

As the AIDS epidemic continues, this belief is being put to the test. There is no question of whether this age-old belief applies to those who suffer from HIV. Whether by targeted persecution on account of their HIV status, or by the sad reality that much of the world lacks effective HIV treatment, many who suffer from HIV today face a grisly, undignified end; an end that could be avoided if such persons were allowed to remain in the more fortunate parts of the world. Yet, the fear of ever increasing numbers of potential immigrants combined with

---

* J.D. Candidate, University of California, Hastings College of the Law, May 2010. Dear thanks to Professor Karen Musalo for her wisdom and passion for teaching, to Kim Thuy Seelinger for her patience and warmth of heart, and to the *Hastings International Comparative Law Review* for their tireless and invaluable support.

1. ALAN PATON, CRY, THE BELOVED COUNTRY 100 (Scribner 1987) (1948).

2. *See Numbers* 35.

3. IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 126 (Paulist Press 1985).

rapidly increasing health care costs pose great political and social challenges for those who would seek protection from such undignified ends.

In an attempt to hold the law accountable to the beliefs underlying its purpose, this note strives to take an account of the state of HIV based claims for protection in the United States and the United Kingdom. Section II outlines the sources of asylum and refugee law and compares each country's unique interpretation of common international instruments. Section III looks at the specific application of those laws to HIV based claims. Section IV offers closing remarks.

II. Sources of Asylum and Refugee Law

Asylum and refugee law has a rich and long history. Section A below deals with the 1951 Convention Relating to the Status of Refugees, comparing its application in the United States and the United Kingdom. Sections B and C discuss the European Convention on Human Rights and the European Union Qualification Directive, respectively. Neither of these instruments apply to the United States and so the discussion of their application is limited to the United Kingdom. Section D briefly discusses the Convention Against Torture and its respective application in both countries.

A. 1951 Convention Relating to the Status of Refugees and the 1967 Protocol

Contemporary refugee law is largely based on the United Nations 1951 Convention relating to the Status of Refugees (1951 Convention), which established a definition of and specific protections for refugees in the aftermath of World War II.[4] The 1951 Convention defines a refugee as a person who

> [a]s a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country....[5]

In line with its purpose, the 1951 Convention included geographic

4. Convention Relating to the Status of Refugees preamble, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

5. *Id.* art. 1.

and temporal restrictions on the definition of refugees, limiting it to persons affected by events which occurred in Europe before 1951.[6] Persons satisfying this restricted definition are granted a range of protections designed to shield them from further harm.[7] However, even though the 1951 Convention deals almost exclusively with the rights of refugees in their new country of residence, no specific article requires States to provide refugees with a legal right to remain.[8] In terms of immigration, refugees are granted only the right of *non-refoulement* defined in Article 33 of the 1951 Convention as follows:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[9]

The 1951 Convention was later expanded through the 1967 Protocol relating to the Status of Refugees (1967 Protocol) which eliminated the geographical and temporal restrictions of the 1951 Convention while maintaining the same refugee definition and protections as the 1951 Convention.[10]

Neither the 1951 Convention nor the 1967 Protocol are self-executing, which means that both are dependent on domestic legislation to give them full effect. Though the Office of the United Nation High Commissioner for Refugees (UNHCR) issues guidelines regarding the proper application of the 1951 Convention and the 1967 Protocol, these

---

6. *Id.* art. 1(B)(1).

7. Much of the 1951 Convention details how the rights afforded to refugees should be equal to those of native citizens. Protection is also provided against punishment due to illegal status. *See id.* arts 17-23, 31.

8. Whether the 1951 Convention requires Contracting States to provide legal status to all refugees is debated. Article 12 states that "(t)he personal status of a refugee shall be governed by the law of the country of his domicile," which indicates that legal status to remain in a country would be dependent on domestic legislation. This is the dominant interpretation. However, Article 31 prohibits Contracting States from imposing penalties on refugees "on account of their illegal entry or presence," so long as they were coming "from a territory where their life or freedom was threatened in the sense of article 1," while Article 32 prohibits Contracting States from expelling any refugee lawfully in their territory. Combined, Articles 31 and 32 suggest that refugees who have entered illegally from a territory where their life or freedom would be threatened should not be punished on account of their illegal entry, but treated as a lawful refugee and therefore must not be expelled.

9. *Id.* art. 33.

10. Protocol Relating to the Status of Refugees art. 1, *entered into force* Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

guidelines are not always followed.[11] The manner in which these international instruments have been implemented by the United States and the United Kingdom is discussed below.

1. The United States

The United States became a party to the 1967 Protocol on November 1, 1968.[12] Over a decade later, the United States enacted the 1980 Refugee Act with the legislative intent of bringing United States immigration law into conformity with the obligations set forth in the 1967 Protocol.[13] Specifically, the 1980 Refugee Act provides three avenues of protection. Persons outside the United States may be invited through an "Overseas Refugee Program," subject to quotas established by the President.[14] Persons already within the territory of the United States may apply for "withholding of deportation" and "asylum."[15]

a. Withholding

Withholding is based on the right of *non-refoulement* provided by Article 33 of the 1951 Convention. A grant of withholding requires three elements: (a) that the claimant's life or freedom would be threatened if removed to his home country; (b) that the claimant is a member of a protected group; and (c) that the threat suffered by the claimant is on account of his or her membership in that protected group. The controlling statute for withholding is 8 U.S.C. § 1251(b)(3) which states that:

> [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group, or political opinion.[16]

In determining whether the claimant's "life or freedom would be threatened," the term "would be" has been interpreted in the United States to be equivalent to a "more likely than not" standard, meaning a

---

11. *See* U.N. High Comm'r for Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/Rev.1 (Jan. 1992).

12. 19 U.S.T. 6224, T.I.A.S. 6577.

13. S. REP. NO. 96-256, at 144 (1980); KAREN MUSALO ET AL., REFUGEE LAW AND POLICY 74 (Carolina Academic Press 2007) (1997).

14. INA § 207, 8 U.S.C. § 1157 (2005). Due to the selective nature of the Overseas Refugee Program, it is not covered in this note.

15. 8 U.S.C. § 1251 (1996).

16. 8 U.S.C. § 1251(b)(3) (1996).

greater than fifty percent chance that the harm will occur.[17] The term "life or freedom" has been interpreted broadly to include social and economic forms of persecution if sufficiently severe.[18]

In determining whether the claimant is a member of a protected group, the enumerated categories of race, religion, nationality, membership in a particular social group, and political opinion serve as the only protected grounds by which a claimant may claim withholding. Race has been understood to be synonymous with ethnic group, referring to any such grouping commonly referred to as "race."[19] Religion includes membership or practice of a particular religion as well as atheism or agnosticism.[20] Nationality is understood to include citizenship to a State as well as ethnic and linguistic groups that may exist within a State.[21] Political opinion includes not only affiliation with official political parties but personal and social beliefs as well; whether an opinion is political is determined on a case by case basis.[22]

Of the enumerated groups, particular social group is both the most complex and the most germane to HIV-related cases. It is also the only group with the flexibility to adapt to the whims of present and future persecutors. This has placed the "particular social group" on embattled ground, as those seeking protection try to broaden the definition of particular social groups while the government generally tries to restrict it. A full analysis of the present debate over particular social group is beyond the scope of this note. Generally, a particular social group is understood to be based on characteristics that are "so fundamental to [a group's] identities or consciences that it ought not be required to be changed."[23]

In determining whether the threat to the claimant is "on account of" a protected ground, the courts have applied a two-part test; first, that the claimant's membership in the protected group be the causal

17. I.N.S. v. Stevic, 467 U.S. 407, 424 (1984).

18. *See* Baballah v. Ashcroft, 367 F.3d 1067, 1076 (9th Cir. 2004) (explaining that economic harm in the form of severe harassment, threats, and discrimination was accepted as a threat to life and freedom, as well as persecution).

19. MUSALO ET AL., *supra* note 13, at 525-30.

20. *Id.* at 463-64.

21. *Id.* at 525-30.

22. *See* Osorio v. I.N.S., 18 F.3d 1017 (2d Cir. 1994) (holding that political actions regarding workers' rights constituted political opinion); Bolanos-Hernandez v. I.N.S., 767 F.2d 1277 (9th Cir. 1984) (accepting the desire to remain neutral amidst civil strife as political opinion).

23. In re Acosta, 19 I. & N. Dec. 211, 212 (BIA 1985) (overturned on other grounds).

factor for the harm suffered; and second, that the persecutor's actions be motivated by the claimant's membership in that same protected group.[24] In cases where the persecutor holds multiple motives for harming the claimant, U.S. law requires that the protected ground be at least one of the central reasons for the persecutor's actions.[25]

This two-part test severely limits the scope of harm that can be used in a claim for withholding. For example, if an HIV-infected man is beaten by a police officer, the man must prove that his HIV status was a central reason for the beating. If the beating was motivated by extortion, personal animus, or any other reason not based on a protected ground, it does not satisfy the requirements of withholding.

It is worth noting that this persecutor's intent requirement is unique to the United States. The UNHCR's guidelines regarding the 1951 Convention and the 1967 Protocol do not require victims to deduce the motivations of their persecutors.[26] Instead, the claimants must show only that their membership in the protected group was a causal factor in their persecution.[27] As a result, the current U.S. interpretation of the 1967 Protocol is in conflict with the international norm. Given that the legislative intent of the 1980 Refugee Act, which established withholding, was to bring the United States into conformity with its obligations under the 1967 Protocol, it is arguable that U.S. law should be interpreted in a manner honoring that legislative intent. At present, this is not the case.

A successful grant of withholding provides a mandatory but limited form of relief. As noted above, the statute provides that the Attorney General "may not" remove a claimant that qualifies for protection. There is no discretion in the grant of withholding. However, claimants granted withholding are only protected from being returned to the specific country where their life or freedom would be threatened. A claimant seeking safety from one country may be granted withholding and subsequently deported to a different country.

b. Asylum

U.S. law currently requires three elements for asylum: (a) that the claimant have a well-founded fear of persecution if removed to his

24. I.N.S. v. Zacarias, 502 U.S. 478 (1992).

25. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 303 (2005).

26. UNHCR, Handbook, *supra* note 11, ¶ 66.

27. *Id.*

home country; (b) that the claimant is a member of a protected group; and (c) that the claimant's past persecution or well-founded fear of persecution be on account of his membership in that protected group. When a claimant satisfies these three elements, the burden of proof shifts to the government to show that the claimant should not be granted asylum due to a fundamental change in circumstances or the possibility of relocation within the claimant's home country. However, even if a claimant satisfies the elements of asylum, and overcomes all grounds of denial, asylum may still be denied in the exercise of discretion.

In contrast to withholding, asylum is not based on any explicit right provided by the 1951 Convention or the 1967 Protocol. However, the definition of persons who may claim asylum is clearly adopted from the refugee definition provided by the 1951 Convention. Asylum is laid out in 8 U.S.C. § 1158 which states that the Attorney General may grant asylum to a claimant determined to be a "refugee."[28] The term "refugee" is defined as follows:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself to the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[29]

As noted above, asylum requires that the claimant have a "well-founded" fear of persecution. The term "well-founded" has been interpreted to mean a generally one in ten chance that the claimant will suffer persecution.[30] This "well-founded" fear of persecution can be proven either by a showing of past persecution creating a presumption of future persecution, or by showing evidence of future persecution directly.

A showing of past persecution creates a presumption of future

---

28. *See* 8 U.S.C. § 1158 (b)(1)(A) (2009) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section of the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101 (a)(42)(A) of this title.").

29. 8 U.S.C. § 1101(a)(42)(A) (2009).

30. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

persecution.[31] This presumption is not limited to the type of past persecution suffered, but is specific to the protected ground the past persecution was on account of.[32] For example, if a claimant suffers past persecution in the form of his family being killed on account of their race, this past persecution creates a presumption that the claimant will again be persecuted on account of his race. The claimant may not be able to lose his family a second time, but that does not protect him from other forms of persecution on account of his race.

Persecution takes on many forms – from physical to economic, from social to political. The boundaries of what type or severity of harm rises to the level of persecution is not set in stone, adapting to the individual circumstances of a claimant's case. A full account of the different types of persecution is again beyond the scope of this note. However, a detailed account of the harms suffered in HIV-related cases in the United States and whether they rise to the level of persecution is presented in Section III-A below.

In regards to the protected grounds by which a claimant may claim persecution, the grounds and their interpretation are identical to that of withholding. Similarly, that the harm suffered by the claimant be "on account of" a protected ground is also identical to that of withholding. Though the U.S.'s interpretation may be in conflict with UN guidance and international norms, it is consistent with itself.

Once a claimant has satisfied the three elements of asylum the burden of proof shifts to the government to show that the claimant should be denied asylum due to a fundamental change in circumstances, or the possibility of relocation within the claimant's home country.[33] Both of these grounds for denial attack the claimant's well-founded fear of future persecution, without which the claimant is not eligible for asylum.[34]

Where a claimant's well-founded fear of persecution is based on past persecution, but the reasons for which the claimant was persecuted in the past are no longer present, the government may claim that a

31. Navas v. INS, 217 F.3d 646, 655-56 (9th Cir. 2000).

32. Mohamed v. Gonzales, 400 F.3d 785, 800-02 (9th Cir. 2005) (holding that past persecution of female genital mutilation on account of membership in particular social group of young girls in her clan created a presumption of future persecution on account of the same ground, and the likelihood that the claimant would suffer the exact same form of persecution was irrelevant).

33. 8 U.S.C. § 1158 (c)(2)(A) (2009).

34. *Id.*

fundamental change in the claimant's circumstances negates the presumption of a current well-founded fear of persecution.[35] For example, if an HIV-positive claimant was severely beaten in the past by police of his home county on account of his HIV status, that claimant has suffered past persecution. That past persecution on account of the claimant's HIV status creates a presumption that the claimant will be persecuted in the future on account of his HIV status. However, if the government can show that reform efforts are underway in an attempt to curb unlawful police beatings, or that the general animus against HIV-positive individuals has subsided in the claimant's home country, such changes may constitute a fundamental change in circumstances that negates the presumption that the claimant's past persecution is indicative of future persecution.

Similarly, when a claimant's past persecution or well-founded fear of future persecution is due to a localized threat, the government may argue that relocation within the claimant's home country may avert the threat and thus negate the claimant's fear of future persecution. For example, if an HIV-positive claimant lives in a province in his country where HIV-positive individuals are persecuted, but has the ability to move to another province where HIV-positive individuals are not persecuted, the government may argue that the claimant may relocate within his country and need not be granted asylum.

However, even if all lawful requirements have been met and all grounds of denial have been overcome, asylum may still be denied in the exercise of discretion. As noted above, 8 U.S.C. § 1158 provides that the Attorney General may provide relief for a person defined as a refugee.

When granted, asylum provides a broad form of relief. A claimant who is granted asylum is granted legal status to remain in the United States and may later adjust his status to that of a lawful permanent resident and subsequently to a U.S. citizen should he desire to do so.[36] Asylees are granted work authorization and may travel abroad with consent of the Attorney General.[37]

35. *Id.*

36. 8 U.S.C § 1158(c) (2009).

37. *Id.*

2. *The United Kingdom*

The United Kingdom is a party to both the 1951 Convention and the 1967 Protocol.[38] All immigration matters in the U.K., including asylum, are governed by the U.K. Immigration Rules which serve as the implementing body of law for the U.K.'s commitments under the 1967 Protocol, as well as other international treaties.[39] Similar to the United States, the U.K. employs a two procedure system for claimants already present in the U.K.: asylum and humanitarian protection.

a. Asylum

Asylum provides legal status to remain in the U.K. for any claimant who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The U.K.'s requirements for asylum are set out in Rule 334 as follows:

> An asylum applicant *will be* granted asylum in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
>
> (ii) *he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;*
>
> (iii) there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom;
>
> (iv) he does not, having been convicted by a final judgment of a particularly serious crime, he does not[sic] constitute danger to the community of the United Kingdom....[40]

The Qualification Regulations referred to in section (ii) above defines the term "refugee" using the definition laid out in the 1951 Convention,[41] specifically that a refugee must have "a well-founded fear

---

38. The United Kingdom ratified the 1951 Convention on March 11, 1954 and acceded to the 1967 Protocol on September 4, 1968. UNHCR Doc. "State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol," Oct. 1, 2008, *available at* http://www.unhcr.org/3b73b0d63.html.

39. *See generally* UK Border Agency, Asylum Policy Instructions, http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/ (last visited Feb. 19, 2010).

40. UK Border Agency, Immigration Rules, rule 334 (last amended Jan. 2010) [hereinafter Immigration Rules], http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/ (last visited Feb. 19, 2010) (emphasis added).

41. The Qualification Regulations define a refugee as "a person who falls within

of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion...."[42]

Persecution may take the form of physical or mental violence, legal or judicial discrimination, or prosecution or punishment when disproportionate to the crime or applied in a discriminatory manner.[43] Whatever its form, the persecution must be "sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right."[44]

Asylum in the U.K. also requires that the persecution suffered be on account of the claimant's race, religion, nationality, membership in a particular social group, or political opinion. Similar to the U.S. the categories of race, religion, nationality, and political opinion are interpreted relatively plainly. Race is interpreted broadly to include color, descent, or ethnicity.[45] Religion includes the belief and expression of theistic, non-theistic, or atheistic beliefs.[46] Nationality includes both citizenship as well as cultural, ethnic, or linguistic identity.[47] Political opinion includes official political affiliations as well as personal opinions and beliefs related to those of persecutors.[48]

Also similar to the United States, the U.K.'s interpretation of particular social group is relatively flexible compared to the other protected grounds. Particular social groups are required to share

> an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.[49]

Article 1(A) of the Geneva Convention," the Geneva Convention defined as the 1951 Convention and the 1967 Protocol. The Refugee or Person in Need of International Protection (Qualifications) Regulations 2006 § 2, *available at* http://www.opsi.gov.uk/si/si2006/20062525.htm.

42. 1951 Convention, *supra* note 4, art. 1. Notably, this definition is identical to that of asylum in the U.S. However, asylum in the U.K. provides a greater degree of protection than in the U.S. as it is a mandatory form of relief and not discretionary as it is in the U.S.

43. *Id.* art. 5.

44. *Id.*

45. *Id.* art. 6(a).

46. *Id.* art. 6(b).

47. *Id.* art. 6(c).

48. *Id.* art. 6(f).

49. *Id.* art. 6(d).

As a mandatory form of relief, asylum must be granted to all claimants who satisfy the legal requirements for asylum.[50] A grant of asylum provides the claimant with a United Kingdom Residence Permit (UKRP) valid for five years. [51]

b. Humanitarian Protection

Humanitarian protection provides legal status to remain in the U.K. for any claimant who has shown substantial grounds for believing that the claimant would face a real risk of suffering serious harm if removed. The U.K.'s requirements for humanitarian protection, laid out in rule 339C of the Immigration Rules, states that,

> A person *will be* granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
>
> (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
>
> (iii) *substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country;* and
>
> (iv) he is not excluded from a grant of humanitarian protection.[52]

Notably, humanitarian protection does not require that the harm suffered be on account of a protected ground. A claimant must only show that they will suffer a "real risk of serious harm." This stands in sharp contrast to both withholding and asylum in the United States, and asylum in the U.K., where a claimant must be a member of a protected group and show that the harm suffered was on account of that protected group. However, despite this lower statutory burden it would be incorrect to assume that humanitarian protection is more easily obtained than asylum.

Humanitarian protection requires that a claimant will likely suffer "serious harm." This term has been interpreted narrowly. The term

---

50. UK Border Agency, Immigration Rules, Rule 334 (Jan. 2010), *available at* http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/ (last visited Feb. 20, 2010).

51. *Id.*

52. *Id.* rule 339(c) (emphasis added).

"serious harm" is defined as,

- the death penalty or execution; or
- unlawful killing; or
- *torture or inhuman or degrading treatment or punishment in the country of return*; or
- serious and individual threat to a civilian's life or person by reason of indiscriminate violence in
- situations of international or internal armed conflict.[53]

In regards to HIV related claims, the third enumerated category of "torture or inhuman or degrading treatment or punishment," is the most relevant. This language comes from Article 3 of the European Convention on Human Rights, and is discussed in detail in section III(B) below.

Humanitarian protection also requires that "substantial grounds" be presented for believing that the harm will occur. The term "substantial grounds" has been interpreted to be a "reasonable degree of likelihood," the same as with asylum in the U.K.[54] As with the grant of asylum in the U.K., a grant of humanitarian protection provides a UKRP valid for five years.[55]

B. European Convention on Human Rights

The European Convention on Human Rights (ECHR) was drafted by the Council of Europe in 1950.[56] The ECHR laid out a set of fundamental human rights to be honored by all member states and established the European Court of Human Rights (ECtHR) to uphold them.[57] The ECtHR has jurisdiction over all member states, and may hear individual cases by citizens of member states.[58] However, even

53. *Id.* (emphasis added).

54. UK Border Agency, Asylum Policy Instructions, *Humanitarian Protection,* at 8, *available at* http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw./asylumpolicyinstructions/ (last visited Feb. 19, 2010).

55. UK Border Agency Immigration Rules, Rule 339Q(i) (Jan. 2010), *available at* http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/ (last visited Feb. 20, 2010).

56. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222, *available at* http://www.unhcr.org/refworld/docid/3ae6b3b04.html [hereinafter "ECHR"].

57. Section I of the ECHR enumerates the rights and freedoms provided by the ECHR, and Section II establishes the European Court of Human Rights to ensure implementation.

58. ECHR, *supra* note 56, art. 34.

though the judgments of the ECtHR are binding on the States and individual parties involved, the judgments are not technically binding on national courts.[59] Indeed, the ECtHR itself does not consider its own past judgments binding on its own present or future cases.[60] Nevertheless, domestic immigration policies often follow ECtHR caselaw.[61]

In an effort "to give further effect to the rights and freedoms"[62] guaranteed by the ECHR, the U.K. passed the Human Rights Act of 1998 which makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right."[63] Practically speaking, this has meant that claimants who believe their deportations by the U.K. Border Agency are incompatible with an ECHR right may bring suit in the U.K.'s domestic courts, asserting their ECHR rights.

Similarly, the U.K.'s internal guidance on asylum and humanitarian protection often cites to doctrines affirmed by ECtHR cases as the appropriate standard for deciding claims.[64] General asylum policy guidance, as well as specific guidance on the ECHR, and humanitarian protection cite directly to standards laid out in cases from the ECtHR as well as from the House of Lords.[65]

C. *European Union Qualification Directive*

The Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive) was enacted by the European Union in 2004[66] as part of a process to establish

---

59. *Id.* art. 46 (stating that final judgments of the Court are binding on member States).

60. Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1, 12 (1978), (stating that the ECHR is a "living instrument which must be interpreted in light of present day conditions"), *available at* http://www.uio.no/studier/emner/jus/jus/JUR2000/h06/undervisningsmateriale/Tyrer.doc. (last visited Feb. 19, 2010).

61. UK Border Agency, Asylum Policy Instructions, *Asylum Policy Instructions October 2006 (re-branded December 2008) ECHR*, 6, *available at* http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/ (listed as "ECHR - European Convention on Human Rights") (last visited Feb. 19, 2010).

62. Human Rights Act, 1998, preamble (Eng.), *available at* www.opsi.gov.uk/ACTS/acts 1998/ukpga_19980042_en_1.

63. *Id.* § 6(1).

64. Asylum Policy Instructions, *supra* note 61, at 5.

65. *Id.*

66. Council Directive 2004/83, 2004 O.J. (L 304) (EU), *available at* http://www.unhcr

a Common European Asylum System.[67] The Qualification Directive created a common refugee definition and established a form of subsidiary protection distinct from refugee status.[68] Persons are eligible for subsidiary protection if, "substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ... would face a real risk of suffering serious harm."[69] "Serious harm" is defined as:

> (a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) serious and individualized threat to a civilians life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[70]

In large part, subsidiary protection was very similar to humanitarian protection that already existed in the U.K. The most notable difference was the inclusion of victims of armed conflict, which was added to the definition of "serious harm" for humanitarian protection in 2006.[71] The U.K.'s immigration rules as described above are currently accepted as in compliance with the Qualification Directive.[72]

D. Convention Against Torture

The United Nations Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) requires states to "prevent acts of torture in any territory under its jurisdiction," and forbids states from returning "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[73] Article 1 of the CAT defines torture as follows:

> [A]ny act by which severe pain or suffering, whether physical or

---

.org/refworld/docid/4157e75e4.html (last visited Feb. 19, 2010).

67. Humanitarian Protection, *supra* note 54, at 7.

68. Human Rights Act, *supra* note 62, chs. II, III, V, VI.

69. *Id.* ch. I, art. 2, § e.

70. *Id.* ch. V, art. 15.

71. Statement of changes in Immigration Rules, Rule 339C, (Oct. 2006), *available at* http://www.official-documents.gov.uk/document/cm69/6918/6918.pdf.

72. Humanitarian Protection, *supra* note 54.

73. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment arts. 2.1, 3.1, *entered into force* June 26, 1987, 1465 U.N.T.S. 85 [hereinafter "CAT"].

> mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[74]

As emphasized in the text, harmful acts are only considered torture if they are carried out at the instigation or acquiescence of a public official or person acting in an official capacity. Though often the harm suffered by claimants seeking asylum is perpetrated by public officials such as police officers or members of the military, this is certainly not always the case. The public official restriction of CAT significantly limits it use.

Article 3 of the CAT states that,

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[75]

Similar to the principal of *non-refoulement* in the 1951 Convention, Article 3 of the CAT also prohibits the return of a person to a country where they may be harmed, in this case where there are substantial grounds that the person would be subjected to torture.

1. The United States

The United States ratified CAT in 1994 and in 1998 enacted the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) to implement its obligations under CAT.[76] The result was a two part system consisting of CAT withholding and CAT deferral.[77]

CAT withholding applies to claimants who satisfy the legal requirements for CAT protection and are not subject to any limiting exceptions, such as being a past persecutor of others or having been previously convicted of a serious crime.[78] Much like withholding under

74. *Id.* art. 1 (emphasis added).

75. *Id.* art. 3.1.

76. The Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 (1998).

77. *See* 8 C.F.R. §§ 208.16(c), 208.17 (2009).

78. A full list of limitations is found in INA § 241(b)(3)(B).

the 1980 Refugee Act, CAT withholding only guarantees that the claimant will not be returned to the country where they may be tortured. However, claimants granted CAT withholding may be released from detention while in the United States and may obtain employment authorization.[79]

CAT deferral applies to claimants who satisfy the legal requirements for CAT protection but are subject to a limiting exception as described above. Claimants granted CAT deferral are still prohibited from being returned to the country where they may face torture, but their status is easily terminated and often persons are kept in detention while in the United States.[80]

2. *The United Kindgom*

The United Kingdom became a party to CAT in 1998. However, nothing in the text of the Immigration Rules or in the UK Home Office's policy guidelines refer to CAT specifically. This may be due to the presence of Article 3 of the ECHR which has a strong presence in the Immigration Rules and offers protection that encompasses that of CAT. While CAT offers *non-refoulement* protection for a limited definition of torture, Article 3 of the ECHR offers absolute protection for a much broader range of harms.

III. Treatment of Claims for Protection Based on HIV Status

The treatment of HIV-related claims varies greatly between the United States and the United Kingdom. Broadly speaking, HIV is treated in the United States as a normal particular social group under asylum law. Claims based on HIV alone are uncommon; likely because persecution on account of an HIV-based protected ground alone is rare and difficult to prove. More often HIV is used as part of a more complex protected ground and serves to bolster the overall claim. For example, HIV status can be used to show that a particular harm suffered was especially severe due to HIV-related medical complications, or that HIV status makes relocation impossible due to medical needs.

In contrast, HIV claims in the U.K. were found to be exclusively claims for humanitarian protection based on Article 3 of the ECHR, which prohibits "torture or inhuman or degrading treatment or

79. MUSALO ET AL., *supra* note 13, at 350.

80. 8 C.F.R. § 208.17(c) (2009).

punishment."[81] Claims are not based on any kind of targeted persecution but solely on humanitarian grounds; that the removal of a claimant suffering from advanced AIDS to a country lacking in treatment or family support may constitute a breach of Article 3 of the ECHR. However, the humanitarian bar for these cases seems to have risen impossibly high as a claimant must be in a near death state to qualify for protection. Claimants who were at a near death state, but have since stabilized their condition due to medical care in the U.K., are no longer protected and may be deported.

A. The United States

In analyzing U.S. caselaw regarding HIV-related asylum claims, this note takes into account decisions from all levels of the asylum process, from the asylum office to the federal courts. General accounts of initial asylum office interviews were made available by the Center for Gender and Refugee Studies (CGRS) at Hastings College of the Law.[82] CGRS maintains a database of case records made up of voluntary submissions by immigration attorneys. Claimants denied relief at the asylum office stage are offered a hearing before an Immigration Judge. Three accounts of Immigration Judge (IJ) rulings were found through *Interpreter Releases*, a reputable journal covering immigration law. Claimants denied relief by the IJ may appeal their cases to the Board of Immigration Appeals (BIA). Three such cases were found through Westlaw and LexisNexis databases. BIA cases may be appealed to the federal court system. Twenty-five federal cases dealing with HIV-related asylum, withholding, and, or CAT claims were found through researching Westlaw and LexisNexis databases.

For the purpose of analysis this note breaks down HIV-related asylum claims into two broad categories: those where the persecution suffered was on account of HIV status, and those where persecution was suffered on account of an alternate or mixed protected ground. This distinction is made due to the marked difference in the forms of persecution suffered by each group. Cases involving persecution on

81. ECHR, *supra* note 56, art. 3.

82. From the CGRS databases, 63 cases involved asylum seekers who were identified as HIV-positive. This includes active cases as well as cases still in strategy and planning phases. Out of these 63, 24 involved HIV-based claims which were resolved or currently pending, 11 articulated an intent to use HIV-based claims but their status was unknown. The remaining 28 cases which involved HIV-positive asylum seekers did not include HIV-based claims. For the purposes of this analysis, only the 24 which involved HIV-based claims and whose current status is known were considered.

account of HIV status were characterized predominantly by claims of inadequate medical care, with claims of discrimination, physical harm and detention also present. Cases involving a broader protected ground, however, largely discarded claims based in inadequate medical care, preferring to focus on their stronger claims of rape, sexual assault, and physical harm. Table 1 below details the number of cases found in each group and the types of persecution suffered. A discussion of each group is found below with a more detailed analysis of representative cases following each section.

Table 1. Forms of Persecution Suffered	Asylum Office[xi]	Immigration Judge[xii]	BIA[xiii]	Federal Courts[xiv]	Sum (% of total)
	Total Number of Cases				
	Cases which presented claim of persecution as described on left. Note that many cases involve multiple claims so totals from these sections may exceed total number of cases shown above.				
Cases Involving Persecution on account of HIV Status	**7**	**1**	**3**	**9**	**20**
Inadequate Medical Care	*7*	*1*	*3*	*6*	*17 (85%)*
Employment / Medical Care Discrimination	*1*	*1*	*2*	*3*	*7 (35%)*
Physical Harm / Detention	*2*	*0*	*1*	*3*	*6 (30%)*
Cases Involving Persecution on account of Other Protected Ground	**17**	**2**	**0**	**16**	**37**
Inadequate Medical Care	2	1	0	2	5 (14%)
Employment / Medical Care Discrimination	0	0	0	2	2 (5%)
Physical Harm / Detention	11	2	0	14	27 (73%)
Rape / Sexual Assault	8	4	0	3	15 (40%)
Total	**24**	**3**	**3**	**25**	**57**

1. *Cases Involving Persecution on Account of HIV Status*

Cases where HIV status alone was the primary characteristic of the asylum seeker were invariably articulated as particular social group claims, where HIV status was the identifying characteristic of their particular social group. HIV status has been accepted as a basis for particular social group, but recent changes to the requirements of particular social group bring uncertainty to the matter.[87] Historically, however, the difficulty with such cases has been in proving harm rising to the level of persecution on account of a particular social group based only on HIV status.[88] Persecution in such cases was limited to general conditions of inadequate medical care, medical care and employment discrimination, and detention.[89] A successful grant of protection in any of these cases was rare.

Most common were claims arguing that general conditions of inadequate medical care constituted a "death sentence" for HIV suffering asylum seekers, thus arising to the level of persecution.[90] A lack of supporting evidence specific to the asylum seeker's own

---

83. Cases are pulled from the Center for Gender and Refugee Studies (CGRS) database. Cases will be referred to based on their CGRS file number.

84. Cases are referenced from accounts published in *Interpreter Releases*. Cases are cited based on case number where available as well as *Interpreter Releases* issue.

85. Cases found through search on Westlaw and LexisNexis.

86. *Id.*

87. *See* 73 *Interpreter Releases* 26 at 909 (INS Office of General Counsel issued a memo stating that "in certain circumstances ... persons with HIV or AIDS may constitute a particular social group under refugee law"); Karouni v. Gonzales, 399 F.3d 1163, 1168 (9th Cir. 2005) (writing that "the INS recognized that in certain circumstances ... persons with HIV or AIDS may constitute a particular social group under refugee law"); Jean-Pierre v. Atty. Gen., 500 F.3d 1315 (11th Cir. 2007) (referencing *Karouni* as well as the INS memo in noting that the government has recognized that HIV/AIDS may constitute a valid particular social group); Interview with Arwen Swink, Immigration Attorney, The Law Office of Robert B. Jobe (Jan. 5, 2009). *But see* Matter of S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008) (finding that youths who have resisted gang recruitment did not satisfy the social visibility test of particular social group); Matter of E-A-G-, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (finding that "persons resistant to gang membership" lacked the social visibility required for particular social group).

88. Interview Victoria Neilson, Legal Director, Immigration Equality (Mar. 2, 2009), Interview Arwen Swink, Attorney, The Law Office of Robert B. Jobe (Jan. 5, 2009).

89. *See* Table 1.

90. *See* Bosede v. Mukasey, 512 F.3d 946 (7th Cir. 2008) (stating that "(i)n short, Bosede argued that a return to Nigeria was akin to a death sentence"); Gebremaria v. Ashcroft, 378 F.3d 734, 736 (8th Cir. 2004) (explaining that "Gebremaria claimed that because of her Human Immunodeficiency Virus status she 'would face a death sentence' if she were forced to return to Ethiopia").

potential treatment, or lack of treatment, was fatal.[91] However, even with ample evidence showing a personal lack of medical care on the part of claimant, the great majority of these claims failed due to a lack of nexus.[92] Though the harm suffered as a result of generally poor medical conditions may be quite severe for someone HIV positive, the harm is not targeted at any individual — let alone a protected group under asylum law — and thus does not satisfy the legal requirements of asylum, withholding, or the definition for torture required under CAT. Despite this shaky legal footing, however, there is some evidence that claims of generally inadequate medical care have been successful.[93] Some lower level accounts suggest that a sympathetic story may sometimes find favor with an understanding judge.[94]

More successful were cases involving discrimination on account of HIV status. These cases argue that a denial of employment and, or medical care on account of HIV status will deny the asylum seeker life-saving medical treatment leading to suffering and death thus rising to the level of persecution.[95] A clear connection between the discrimination and the suffering and loss of life that will result is crucial as mere discrimination such as the loss of a job does not rise to the level of persecution.[96] Similarly, the existence of anti-discriminatory laws, even if they are only sporadically if at all enforced, may undermine the perceived breadth of discrimination preventing a court from finding persecution.[97] Without official government policy clearly

91. Calle v. Att'y. Gen., 264 F.App'x. 882 (11th Cir. 2008) (writing that a homosexual HIV-positive man from Argentina argued that "hospitals in Argentina did not have his medication," though he later "admitted that he did not have any evidence that he would be unable to receive treatment," and was denied relief).

92. Ixtlilco-Morales v. Keisler, 507 F.3d 651, 652 (8th Cir. 2007) (writing that Morales, a homosexual HIV-positive man from Mexico was denied asylum because he "did not establish that the lack of care was an attempt to persecute homosexuals or those with HIV").

93. *See Matter of -*, reported in 78 *Interpreter Releases* 3 at 233; *Matter of -*, reported in 73 *Interpreter Releases* 26 at 901.

94. *See id.*; Interview with Victoria Neilson, Legal Director, Immigration Equality (Mar. 2, 2009).

95. *See* Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005); In Re Argueta, 2003 WL 23521910 (BIA 2003).

96. Torres v. Att'y Gen., 269 F.App'x 190, 191, 2008 WL 683930 (3d Cir. 2008) (unpublished decision) (involving a homosexual HIV-positive man from Colombia was fired due to homosexuality, and holding that the firing constituted harassment and discrimination, but not persecution).

97. Paredes v. Att'y. Gen., 219 F.App'x 879 (11th Cir. 2007) (No. 06-13944). Homosexual HIV-positive man from Venezuela argued that he "would be denied

discriminating against HIV status, persons making these claims become dependent on the existence of widespread social animus against HIV. To prove such widespread social animus up-to-date country condition reports are essential.[98] Where there is clearly widespread discrimination, whether due to government policy or social animus against HIV status, the courts have held that such discrimination may exacerbate existing persecution and render relocation unreasonable.[99]

Least common were cases involving detention on account of HIV status. These cases involve the detention of HIV-positive persons, whether by official government policy or by the actions of government actors.[100] It is uncertain exactly how long or severe an asylum seeker's detention must be to rise to the level of persecution; a few hours is clearly too short, a few years is more than sufficient.[101] One key factor seems to be whether the asylum seeker had reason to fear for their long term freedom and safety; if an asylum seeker knows they are only being held for a few days it is not persecution, but if their detention is potentially indefinite it may be persecution even if the actual length of

---

medical treatment because he had HIV." *Id.* ¶ 2. Provided expert testimony that "most employers in Venezuela participated in unauthorized HIV tests prior to offering employment and, if an individual tested positive for HIV, the employer would likely not give a job offer. Reyna stated that health care providers also discriminated against gay men and that, even though such discrimination was against the law, the government did not prosecute the discriminators." *Id.* ¶ 10. However, the court held that "Paredes' fear of employment discrimination did not rise to the level of persecution where the Venezuelan government had made it illegal to engage in blood tests as a condition of employment but some individual employers still required blood tests." *Id.* ¶ 16.

98. *In Re Argueta*, 2003 WL 23521910 (involving HIV-positive man from Honduras who argued that "there is such pervasive and severe discrimination against AIDS patients, including denial of employment, that it amounts to persecution," but six of fourteen supporting documents were over four years old, leading the adjudicator to find there was insufficient evidence as to the current state of discrimination in Honduras).

99. *Karouni*, 399 F.3d at 1168 (holding that Karouni's HIV/AIDS status would force him to reveal his homosexuality if returned to Lebanon, thus subjecting him to anti-homosexual persecution); *Boer-Sedano*, 418 F.3d 1082 (holding that Boer-Sedano's inability to obtain medical treatment in Mexico due to employment and medical care discrimination against HIV-positive persons rendered relocation anywhere in Mexico unreasonable).

100. *See generally, Karouni*, 399 F.3d 1163, *Bosede*, 512 F.3d 946.

101. *Torres*, 269 F.App'x 190 (explaining that a homosexual HIV-positive man from Colombia was detained after a police raid on a discotheque, and the court held that customary police detention may constitute harassment, but does not rise to the level of persecution).

detention was relatively short.[102]

a. Paredes v. Attorney General

Paredes v. Attorney General illustrates the difficulty in proving persecution for the types of harm suffered on account of HIV status. Paredes provided ample evidence of employment and medical care discrimination against men with HIV, showing that in all likelihood Paredes would not be able to obtain the medication he needed to survive if deported back to Venezuela. However, in Paredes' case the existence of government laws outlawing such discrimination made it extremely difficult to prove that the government was unwilling or unable to protect Paredes, as is required under asylum law. In the battle over establishing the real country conditions of Venezuela, the court favored Venezuela's formal anti-discrimination laws over the testimony of aid workers on the ground describing the discrimination their clients experienced in their daily lives. It is uncertain what evidence would have persuaded the court to acknowledge a pattern and practice of discrimination against homosexuals with HIV in Venezuela, despite laws to the contrary.

Paredes' case also illustrates the importance of connecting HIV-based discrimination to the suffering and death an HIV positive person will experience if unable to secure medical treatment. In this case the court quickly dismissed Paredes' claims of employment and medical care discrimination, holding that "although discrimination is reprehensible, it does not rise to the level of persecution."[103] To support this holding, the court cites a previous case which held that "mere harassment does not amount to persecution."[104] However, while discrimination in the form of not being hired for a job is arguably similar to harassment and therefore should not amount to persecution, being denied medical treatment necessary to stay alive is arguably quite different and should amount to persecution.

102. *Bosede*, 512 F.3d at 948-49 (explaining that a HIV-positive man returning to Nigeria was detained at airport due to HIV positive status and was released only after promising to stay at a specific hotel named by airport officials, but fearing for his safety, the man fled the hotel and later bribed airport officials to reenter the United States).

103. *Paredes*, 219 F.App'x at 887.

104. *Id.* (citing Sepulveda v. Atty Gen., 401 F.3d 1226, 1231 (11th Cir. 2005)).

Case Summary

Paredes v. Attorney General was an Eleventh Circuit case involving a homosexual HIV positive man from Venezuela.[105] Paredes sought asylum, withholding, and protection under CAT, arguing that he had a well-founded fear of future persecution on account of his membership in the particular social group of "homosexual men infected with HIV."[106] Paredes claimed future physical harm on account of his homosexuality, and denial of employment and medical treatment on account of his HIV positive status.[107]

An expert on HIV issues in Venezuela testified that Paredes would be unable to obtain HIV medication in Venezuela for three main reasons.[108] First, Paredes could only obtain treatment through Venezuela's social security system if he had a job, and despite laws prohibiting discriminatory behavior many employers still required medical exams for employees and did not hire persons with HIV.[109] Second, even if Paredes could qualify for social security, the system had a preference for women and children which would result in the exclusion of Paredes as a man.[110] Third, Paredes would be unable to qualify for private health insurance as private companies excluded persons with HIV.[111] Paredes also introduced ample country conditions evidence supporting the expert witness' testimony as well as establishing general animosity against homosexuals in Venezuela.[112]

The government argued that large demonstrations, such as the 2002 Venezuelan Gay Pride Celebration which included over 50,000 participants, undermined Parede's claim of a well-founded fear of persecution on account of his homosexuality.[113] Additionally, a 2001 Venezuelan Supreme Court decision had ruled that all Venezuelans with HIV were entitled to free treatment, and the right to work and live privately, free from discrimination.[114]

The IJ found Paredes' testimony credible and accepted Paredes'

105. *Paredes*, 219 F.App'x at 880.
106. *Id.*
107. *Id.*
108. *Id.* at 882.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 883.
114. *Id.*

membership in the particular social group of homosexual men with HIV.[115] However, the IJ denied Paredes' claim for asylum, holding that Paredes had supplied insufficient evidence that he himself would be targeted for harm or discrimination on account of his homosexuality or HIV status.[116] The IJ noted that the Venezuelan government had taken affirmative steps to fight against such discrimination, and that Paredes' expert witness was not credible because his knowledge was derived from the experiences of others shared with him in the course of his work as a social worker in Venezuela.[117] Finally, the IJ noted that Paredes' repeated trips back and forth to Venezuela undermined his claim of a fear of persecution if returned to Venezuela.[118]

The BIA affirmed the IJ's decision, noting that Paredes had provided evidence that homosexuals in Venezuela may suffer various hardships, but that the evidence did not support a claim of a well-founded fear of persecution.[119]

In his appeal to the federal court, Paredes abandoned his CAT claim and argued that the IJ and BIA had erred on his asylum and withholding claims on four grounds. First, the IJ had failed to use a pattern and practice analysis when adjudicating his claim, instead incorrectly focusing on specific acts of persecution. Second, even if the IJ did use a pattern and practice analysis, the IJ erred in finding that Paredes' evidence of harassment, discrimination, detention, and beatings of homosexual HIV-positive men failed to establish a pattern and practice of persecution. Third, the IJ relied on out-of-date information regarding the policies of the Venezuelan government concerning the treatment of homosexuals with HIV, specifically, that a proposal advocating homosexual rights mentioned in the evidence was in fact never enacted into law. Fourth, the IJ was incorrect in discounting the testimony of Paredes' expert witness after already accepting him as an expert witness.[120]

In regards to the first argument, the court held that the IJ and BIA both used a pattern and practice analysis even if they did not mention it by name.[121] Determining whether or not Paredes would be singled out

115. *Id.*
116. *Id.*
117. *Id.* at 884.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 886.

for future discrimination, and whether the government either controlled or sponsored such discrimination "reasonably relates to the question of ... a pattern of practice of persecution."[122]

The court then stated that though Paredes introduced evidence of discrimination, discrimination itself does not rise to the level of persecution, either in terms of employment or medical care benefits.[123] In light of the evidence concerning the government's attempts to outlaw persecution against homosexuals with HIV, the court held that such discrimination was not enough to warrant a reversal under the substantial evidence standard.[124]

The court did not address Paredes' third argument explicitly, but notes that even admitting the failure of the aforementioned proposal to pass into law, other efforts by the government such as laws outlawing discrimination against homosexuals with HIV effectively illustrated the government's attempts to combat discrimination.[125]

In regards to Paredes' claim that his expert's testimony was unfairly limited, the court held that the IJ's decision to limit the weight of testimony is distinct from limiting the testimony.[126] The weight given to evidence is within the IJ's discretion.[127]

For the reasons above, the court denied Paredes' claim for asylum, and while noting that the evidentiary bar for withholding is greater than that for asylum, denied Paredes' claim for withholding as well.[128]

b. Bosede v. Mukasey

Bosede serves as an example of the difficulty in proving harm on account of HIV status. Fortunately for Bosede, he was granted remand on due process grounds. Unfortunately, this leaves no holding relating to Bosede's original claims. However, the tone and dicta of the case seem to suggest that the court favorably considered Bosede's claims. Though the court does not address each facet of Bosede's claim individually, as a whole the court considers the totality of Bosede's claim as consisting of "imprisonment, mistreatment, and possibly

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 888.
127. *Id.*
128. *Id.*

death."[129] These forms of harm are later categorized as "persecution or torture."[130] Though no holding relating to these facts is given, the court seems to suggest that Bosede's detention and potential poor medical care would rise to the level of persecution.

Case Summary

Bosede came to the United States legally in 1980, becoming a permanent resident in 1982.[131] Marrying a U.S. citizen, Bosede fathered two children before being diagnosed with HIV in 1997.[132] Due to numerous conflicts with the law, however, in 2001 immigration authorities sought to remove Bosede as an alien convicted of a drug offense and an aggravated felony.[133] Bosede sought asylum, withholding, and protection under CAT, arguing that he would be persecuted in Nigeria on account of his Christian religion and his HIV-positive status.[134]

Before the IJ, Bosede testified that during a past visit to Nigeria in 1999, he was detained by airport authorities on account of his HIV status when HIV medication was found in his luggage.[135] Bosede was released only after he had agreed to stay at a hotel specified by the airport authorities.[136] Fearing for his safety, Bosede immediately left the hotel and later bribed airport officials to return to the United States.[137]

Bosede also introduced testimony that under Nigerian law he would be imprisoned immediately upon his return to Nigeria. Under "Decree 33" any Nigerian citizen convicted of a drug crime abroad is automatically sentenced to five-years imprisonment.[138] In combination with this claim, Bosede argued that because of his HIV status, he would suffer extreme hardship in a Nigerian prison. Bosede furnished evidence that a lack of doctors, medication, and even basic nutrition had led to high death rates for HIV-positive prisoners in Nigeria's prisons.

---

129. *Bosede*, 512 F.3d at 951.
130. *Id.*
131. *Id.* at 948.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 949.
136. *Id.*
137. *Id.*
138. *Id.*

For reasons unknown, Bosede abandoned his asylum claim by the time his case went before the IJ, leaving only his claims for withholding and protection under CAT. The IJ denied Bosede's claim for withholding on the ground that Bosede's prior drug offenses were presumed to be particularly serious crimes, which barred Bosede from relief under withholding. Bosede's CAT claim was denied on the ground that Bosede had not provided sufficient evidence to show that he would likely be detained if returned to Nigeria.[139] The IJ noted that Bosede's fear of detention under Decree 33 was merely speculative and that his prior ability to enter and leave the country by bribing airport officials undermined his claim that he would be detained if removed to Nigeria.[140] The BIA subsequently affirmed.

In his appeal to the federal court, Bosede argued that the IJ erred as a matter of law in characterizing his prior drug possession as a "drug trafficking crime" as required by the statute under which he was being deported. The court noted that usually it does not have jurisdiction to second guess the BIA when it makes a discretionary decision such as whether a prior crime was a "drug trafficking crime." However, the court noted that it does reserve the right to determine whether there has been a violation in due process. Here, the court held that the IJ's treatment of Bosede's case violated Bosede's due process rights. A finding that a crime was a "drug trafficking crime" is usually subject to various "unusual circumstances" exceptions, such as the amount of drugs involved, or the absence of any threat of violence. The court noted that the IJ did not allow Bosede a chance to argue any of these unusual circumstances despite evidence in the record suggesting that many of them would have applied to Bosede.

The court went on to note a "cavalier attitude" by the IJ in regards to Bosede's case and was:

> appalled that the IJ would rest his decision on the absurd proposition that Bosede could evade *imprisonment, mistreatment, and possibly death* by approaching his jailers and trying to buy his way out .... We have said before and underscore here that whether an alien might succeed in escaping *persecution or torture* through bribery is an irrational and altogether improper consideration in deciding a claim for asylum or other relief."[141]

Again, though not part of the holding of the case, this dicta seems

139. *Id.* at 950.

140. *Id.*

141. *Id.* at 952 (emphasis added).

to suggest that the judge viewed Bosede's claims of detention and future poor medical care seriously, and considered them comparable to persecution or torture. The court went on to hold that Bosede's due process rights had been violated and remanded the case for a new hearing with a different immigration judge.[142]

2. Cases Involving Persecution on Account of Other Protected Grounds

HIV status was most often used in cases as part of a more complex protected ground, such as a particular social group of "homosexual men infected with HIV,"[143] or political opinions in favor of "bisexuals, transsexuals, and people infected with HIV."[144] In most of these cases, HIV status acts as an aggravating factor to the persecution suffered. Though an asylum seeker's main claim may be persecution on account of sexual orientation, HIV status may (a) impute the persecuted sexual orientation making it impossible to avoid persecution;[145] (b) increase the health risks of persecution due to medical complications;[146] or (c) highlight medical needs that render relocation unreasonable.[147]

Persecution in these cases is much more varied as it is no longer on account of HIV/AIDS status alone. Many of the cases involved homosexual Latin American men who suffered harassment, detention, discrimination, abandonment, beatings, rape, death threats and, or the deaths of their friends on account of sexual orientation in their home countries before fleeing to the United States and subsequently learning of their HIV/AIDS status.[148] Such harms have a mixed record of

142. *Id.*

143. *Paredes*, 219 F.App'x at 880.

144. Rico v. U.S. Att'y. Gen., 154 F.App'x 875, 876 (11th Cir. 2005).

145. *Karouni*, 399 F.3d at 1168 (holding that Karouni's HIV/AIDS staus would impute homosexuality if returned to Lebanon, thus subjecting him to persecution).

146. *Jean-Pierre*, 500 F.3d at 1315 (involving a Haitian HIV-positive man who suffered from advanced HIV infection rapidly leading to mental illness, which he argued would cause prison guards to target him for torture, but the IJ had held that generally poor medical conditions do not constitute persecution, and the Court remanded, holding that targeted torture due to HIV-caused mental illness was different from suffering caused by generally poor conditions in Haitian prisons).

147. *Boer-Sedano*, 418 F.3d at 1082 (holding that Boer-Sedano's inability to obtain medical treatment in Mexico due to employment and medical care discrimination against HIV positive persons rendered relocation anywhere in Mexico unreasonable).

148. *Paredes*, 219 F.App'x at 879 (writing that a homosexual HIV-positive man from Venezula testified to verbal harassment of other homosexuals, and the Court held that verbal harassment does not rise to the level of persecution); Rocha v. Att'y. Gen., 253 F.App'x 167, 169 (3rd Cir. 2007) (involving a homosexual HIV-positive man from Venezuela who was called a "whore" by police and was sexually assaulted with a gun,

success in qualifying as persecution. Harassment rarely rises to the level of persecution.[149] Detention and discrimination may rise to the level of persecution if it is severe enough to cause a genuine threat to the life or freedom of the asylum seeker.[150] Abandonment, beatings, rape, death threats and the actual threat of death all rise to the level of persecution.[151]

a. Ixtlilco-Morales v. Keisler

Morales' case is representative of the majority of claims involving HIV. There is a strong central claim to which a less developed HIV based claim is added. In this case Morales' central claim was his past persecution as a child on account of his homosexual behavior. In addition to this, Morales' argued that generally poor medical conditions in Mexico would amount to persecution due to his HIV-positive status if removed. In this case, there was little integration between the main, and secondary HIV-based claim. As noted above, this type of claim is commonly raised in cases involving HIV-positive claimant and is almost always rejected. A failure to show that the absence of treatment was targeted at HIV-positive persons prevents the harm from being "on account of" a protected ground.

Case Summary

Ixtlico-Morales v. Keisler involved a homosexual HIV-positive man from Mexico who had been beaten by his father, mother, and bothers since the age of nine for displaying homosexual behavior.[152] At the age of ten, Morales' father threw him out of the house saying he would never accept a homosexual as a son.[153] Twice Morale's attempted to

but the court held that harm was harassment and discrimination, but not persecution); *Ixtlilco-Morales*, 507 F.3d at 651 (explaining that a homosexual HIV-positive man from Mexico was beaten from the age of 9 by his father for his homosexual identity and was later disowned by his family for maintaining homosexual identity, and the Court held that beatings and abandonment of a child rose to the level of persecution); *Boer-Sedano*, 418 F.3d at 1082 (writing that a homosexual HIV-positive man from Mexico was repeatedly raped and threatened with death by a police officer on account of sexual orientation, and the Court held that beatings, rape, and verbal death threats each rise to the level of persecution).

149. *See* Kazlauskas v. INS, 46 F.3d 902, 907 (9th Cir.1995) (explaining that in this case, harassment and ostracism did not arise to the level of persecution).

150. *See Paredes*, 219 F.App'x at 879.

151. *See Boer-Sedano*, 418 F.3d at 1082.

152. *Ixtlilco-Morales*, 507 F.3d at 652.

153. *Id.*

return to his family, and twice his family rejected him.[154] At the age of twelve Morales attempted to commit suicide.[155] In 1994, when Morales was seventeen years old, he entered the United States without documentation and found his way to Minnesota where he was able to live openly as a homosexual.[156] Morales was diagnosed with HIV in 2003, and soon after applied for asylum, withholding of removal, and protection under CAT.[157] Morales argued past persecution on account of his homosexuality, future persecution on account of his homosexuality, as well as future persecution due to a lack of medical care for his HIV status if removed to Mexico.

The Immigration Judge found Morale's testimony credible but concluded that the past harm Morales suffered was not persecution "because it was not inflicted by the government or by actors the government was unable or unwilling to control."[158] The IJ held that since Morales had failed to notify the police of his situation, he did not establish that the government was unwilling to help.[159] Morales appealed his case to the BIA.[160]

The BIA disagreed with the IJ's holding concerning Morales' failure to notify, noting that "[g]iven Morales's young age at the time of the abuse and evidence in the record showing that domestic abuse of homosexual children is a significant problem in Mexico, [it is] insignificant that Morales did not report the abuse."[161] However, though this past persecution now created a presumption of a well-founded fear of future persecution for Morales, the BIA ruled that this presumption was rebutted by a fundamental change in Morales' circumstances.[162] Morales was no longer a child.[163]

As for Morales' claim that a lack of medical care for HIV/AIDS would lead to persecution, the BIA held that "Morales did not establish that the lack of care was an attempt to persecute homosexuals or those

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 653.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*

with HIV."[164] The BIA held that Morales was not eligible for asylum, withholding, or protection under CAT.[165]

Morales appealed to the federal courts, arguing that the BIA was incorrect in determining that age could constitute a fundamental change in circumstances.[166] However, the federal court affirmed the BIA's holdings and denied Morales' claims for withholding and protection under CAT as well. [167]

b. Boer-Sedano v. Gonzales

Boer-Sedano v. Gonzales illustrates how HIV-based claims can be used to augment other claims for relief. Boer-Sedano's main claim was one based on past persecution on account of his homosexuality. Once established, the case turned on whether Boer-Sedano could be subject to any of the rebuttals against the presumption of a well-founded fear that flows out of a finding of past persecution. The main rebuttal used by the government was that of reasonable relocation. If relocation had been shown to be reasonable, then despite Boer-Sedano's established past persecution the presumption that Boer-Sedano would again be persecuted on account of his homosexuality would have been broken. Boer-Sedano would have been forced to argue a well-founded fear of future persecution based only on his country conditions evidence of the treatment of homosexuals in Mexico.

In this regard, the use of Boer-Sedano's HIV status to show that relocation within Mexico was unreasonable was a crucial element of Boer-Sedano's case. The skillful combination of Boer-Sedano's HIV status to show dire medical need, and employment discrimination on account of homosexuality that would make that need impossible to satisfy within Mexico, created an argument stronger than what either HIV status or homosexuality on its own could support.

Case Summary

Boer-Sedano v. Gonzales was a Ninth Ciruit case involving a homosexual man with HIV from Mexico.[168] Boer-Sedano was born in Tampico, a small city on the eastern coast overlooking the Gulf of

164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 657.
168. *Boer-Sedano*, 418 F.3d at 1082.

Mexico.[169] From the age of seven Boer-Sedano knew that he was homosexual.[170] Unfortunately, Boer-Sedano's family was unwilling to accept a homosexual child.[171] Boer-Sedano was ostracized by his family and friends, and kept away from relatives in fear that he would be a "bad influence" on them.[172]

In 1988 Boer-Sedano was travelling by car with a friend when they were stopped by a "high ranking police officer."[173] The officer arrested and detained the men for twenty-four hours, telling them that they were being held because they were homosexual, at which point Boer-Sedano responded by saying that homosexuality was not a crime in Mexico.[174]

Over the next three months Boer-Sedano was raped nine times by the same police officer that had previously arrested him.[175] The officer would arrest Boer-Sedano, drive him to a dark location, and force him to perform oral sex, threatening that he knew where Boer-Sedano lived and worked and would reveal his homosexuality if he resisted.[176] The officer would also make derogatory comments indicating that he was targeting Boer-Sedano on account of his homosexuality.[177] On one occasion the officer "pulled out his hand gun and put a bullet in the chamber and rolled the cylinder and put the gun to [Boer-Sedano's] head and said 'if you're lucky this is going to be your fate.'"[178]

After three months, Boer-Sedano fled to Monterrey, Mexico, and worked in an underground discotheque while applying for a visitor's visa to the United States. Boer-Sedano secured a visitor's visa in April 1989 but remained in Mexico to save up funds for his relocation. In July 1989, the underground discotheque was raided by police who questioned Boer-Sedano's sexual orientation. Fearing that he would again be raped by police, Boer-Sedano began planning his escape from Mexico. For the next year Boer-Sedano travelled to the United States to buy goods to sell in Mexico, earning money to finance a new start in the

169. *Id.* at 1085.
170. *Id.*
171. *Id.*
172. *Id.* at 1086.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

United States. In September of 1990, Boer-Sedano fled to San Francisco and has not returned to Mexico since.[179]

In 1992 Boer-Sedano was diagnosed with HIV.[180] He was at that time working in the United States as a waiter and a busy boy at a hotel which provided him with medical insurance that covered his AIDS treatment.[181] Over the course of his treatment Boer-Sedano developed resistance to many common drug treatments and would soon need "new anti-retroviral agents."[182]

Boer-Sedano sought asylum, withholding, and protection under CAT. Boer-Secado's claims were past persecution of rape and death threats on account of his homosexuality, future persecution on account of homosexuality, future persecution of employment discrimination leading to an inability to obtain medication on account of homosexuality and AIDS, as well as future persecution of a lack of effective AIDS treatment.[183]

The IJ found Boer-Sedano credible but denied Boer-Sedano's claims holding that homosexuality was not a valid basis for a particular social group and that the past persecution of rape and death threats were "a personal problem" between Boer-Sedano and the police officer and not persecution.[184] The claim of future persecution was discredited due to Boer-Sedano's ability to live and work in Monterrey. The claims of withholding and CAT were also denied.[185] BIA affirmed the IJ's decision without opinion.[186]

Before beginning its analysis, the court noted that it reviews the factual findings of the BIA under the substantial evidence doctrine, where the court may only overturn the BIA's decision when the evidence is so compelling that "no reasonable factfinder could fail to find that Petitioner has not established eligibility for asylum."[187] Also, as the BIA affirmed without opinion, "the court may review the IJ's decision as the final agency determination."[188]

---

179. *Id.*
180. *Id.* at 1087.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* (as there is no opinion by the BIA available to review).

In regards to Boer-Sedano's claim of past persecution of rape and death threats on account of his homosexuality, the court held that homosexuality was a valid basis for a particular social group and that acts by a police officer are "the prototypical state actor for asylum purposes."[189] The harm of rape and death threats were held to easily rise to the level of persecution.[190]

With Boer-Sedano's past persecution on account of homosexuality established, Boer-Sedano enjoyed a presumption of future persecution based also on homosexuality. The court noted three arguments that the IJ presented rebutting this presumption. First, country conditions indicated that discrimination against homosexuals was not so severe in Mexico. Second, relocation was possible as it had been to Monterrey. Third, Boer-Sedano's repeated trips back and forth between Mexico and the United States undermine any claim of fear of persecution in Mexico.

In regards to the first claim, the court held that the government failed to provide sufficient evidence to show a change in country conditions.[191] The government had provided evidence that violence against homosexuals was not so severe and was usually limited to transvestites, which Boer-Sedano was not.[192] However, the court noted that Boer-Sedano provided numerous sources of evidence proving that violence against homosexuals was not limited to transvestites, but continued to be a serious problem for homosexuals in Mexico.[193]

In regards to relocation within Mexico, the court holds that the government failed in proving by a preponderance of the evidence that relocation was reasonable for Boer-Sedano.[194] The government had argued that Boer-Sedano had failed to prove that the persecution he feared was country-wide, that relocation was unreasonable.[195] However, the court noted that once Boer-Sedano had proved past persecution, it was the government's burden to prove that relocation was reasonable.[196] Also, the court noted that Boer-Sedano's homosexuality and HIV-positive status would likely make it impossible for him to find a job, thereby making it impossible to obtain necessary

189. *Id.* at 1088.
190. *Id.*
191. *Id.* at 1089.
192. *Id.*
193. *Id.*
194. *Id.* at 1090.
195. *Id.*
196. *Id.*

medical treatment, thus rendering relocation unreasonable.[197]

In regards to Boer-Sedano's return trips to Mexico, the court held that Boer-Sedano's return trips did not in themselves rebut the presumption of a well-founded fear in Mexico.[198] Return trips are but one element of many in considering whether the presumption has been rebutted.[199] In this case, the court noted that "in light of the evidence of continuing persecution of homosexuals in Mexico, no reasonable factfinder could find that Boer-Sedano's return trips alone" rebut the presumption of a well-founded fear.[200]

For the reasons above, the court found Boer-Sedano "statutorily eligible for asylum and remand for an exercise of discretion."[201] As Boer-Sedano's claim for withholding was not fully considered by the IJ or BIA in their previous opinions, the court remands Boer-Sedano's withholding claim to the BIA.[202] Noting the strict requirements for torture required by the CAT, the court held that the IJ was within its discretion to deny Boer-Sedano's claim for CAT protection.[203]

B. The United Kingdom

The asylum and humanitarian protection process in the U.K. begins with a substantive interview with a U.K. border agency officer.[204] This first stage consists of two meetings resulting in a decision, appealable to the Asylum and Immigration Tribunal (AIT).[205] The AIT consists of a one to three member panel which reviews cases on issues of law only.[206] The AIT's decisions were formerly appealed to the UK House of Lords, which consisted of an appellate committee of five members of the

197. *Id.* at 1091.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1092.

202. *Id.*

203. *Id.*

204. UK Border Agency, http://www.ukba.homeoffice.gov.uk/asylum/process (substantive interview occurs during the first step of "screening") (last visited Feb. 19. 2010).

205. UK Border Agency, http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccessfulapplications/ (last visited Feb. 19, 2010).

206. Asylum & Immigration Tribunal, http://www.ait.gov.uk/AboutUs/aboutUs.htm (last visited Feb. 19. 2010). As of February 15, 2010, the AIT has been replaced by the Immigration and Asylum Chamber. *See* http://www.tribunals.gov.uk/ImmigrationAsylum/ (last visited Feb. 20, 2010).

House of Lords. However, starting October 1, 2009 the Supreme Court of the United Kingdom assumed jurisdiction over all civil cases in the U.K., including claims of asylum and humanitarian protection.[207]

The analysis in this note draws from cases by the AIT, the Court of Appeal, the House of Lords, and the ECtHR. No records from initial substantive interviews were found.[208] Similarly, no cases from the Supreme Court regarding HIV-related claims were found.[209] The AIT's reported database contained eight cases from 2002 to 2005 involving claimants who brought HIV-based claims.[210] All eight of these cases involved Article 3 based claims of humanitarian protection which was the issue appealed to the AIT. Many of these cases involved non-HIV-related asylum claims at earlier stages which were denied and not appealed to the AIT and were therefore not substantively discussed in the AIT's decisions. No cases involving HIV-based asylum claims were found.

Four cases involving HIV-based claims were found in the records of the Court of Appeal, as available through Westlaw and Lexis. The dates of these cases ranged from 2005 to 2008. Three of these cases were denials of appeal from the AIT involving HIV-positive claimants seeking Article 3 based humanitarian protection. The fourth case was a remand clarifying the appropriate standard for Article 3 based claims of humanitarian protection. However, the facts of the case were not discussed and so the case is not included in the table below. Again, no HIV-based asylum claims were found.

From the House of Lords only one case, *N v. SSHD [2005] UKHL 31*, was found. *N v. SSHD* currently stands as the highest ruling in the U.K.

---

207. *From House of Lords to Supreme Court*, PARLIAMENT UK, July 23, 2009, http://news.parliament.uk/2009/07/from-house-of-lords-to-supreme-court/ (last visited Feb. 19, 2010).

208. Similar to the United States, no records of initial substantive interviews are kept.

209. No cases were found via Westlaw, LexisNexis, nor through a search of the Court's online database at http://www.supremecourt.gov.uk/decidedcases/index.html.

210. The Asylum and Immigration Tribunal ("AIT") maintains a searchable database of reported cases at http://www.ait.gov.uk/Public/SearchReported.aspx. These cases represent only a part of the AIT's total caseload but are offered as representative of the AIT's caselaw. The remainder of the AIT's cases are available as well at http://www.ait.gov.uk/Public/Searchunreported.aspx but are not indexed or searchable via key terms. These cases are searchable only by date, and were not included in the analysis of this note. To reiterate, the AIT has been replaced by the Immigration and Asylum Chamber (IAC). The AIT's website is still valid, but it is no longer referred to. The AIT website refers the viewer to the new IAC website.

regarding Article 3 based claims for humanitarian protection. Though the case was appealed to the ECtHR in *N v. UK*, the ECtHR affirmed the House of Lords decision. Therefore, the framework laid out in *N v. SSHD* remains the law and is cited by subsequent cases and official U.K. Border Agency guidance as the proper standard for Article 3 based claims for humanitarian protection.[211]

From the ECtHR come the two cases of *D v. UK* and *N v. UK*. These are the only two cases from the ECtHR concerning HIV based immigration claims and represent the beginning and present state of Article 3 based humanitarian protection claims in the ECtHR, respectively.[212]

Table 2 below charts the progression of these cases in chronological order, highlighting the evolution of the factors required in Article 3 based claims for humanitarian protection from *D v. UK* to *N v. UK* to new emerging factors. A summary of the current Article 3 standard, how it got there, and where it's going lies below, with a more detailed discussion of individual cases illustrating these trends following.

211. UK Border Agency Asylum Policy Instructions, *European Convention on Human Rights*, at 16, *available at* http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/ (last visited Feb. 19, 2010).

212. Two other cases exist on the ECtHR's record involving HIV-based immigration claims, Ahmed v. Sweden, 9886/05, and B.B. v. France, 30930/96. However both of these cases were struck from the ECtHR's list of cases and did not reach a decision on their merits.

Table 2. The Evolution of Article 3 Based Claims in the U.K.
✓ Present[213]
⊘ Not Present
- Not Discussed

	Article 3 Factors Acknowledged by the ECtHR in *D.*						
	Relevant Article 3 Factors as per *N.*						
	Poor Current Medical Condition/ Near Death	Non-Availability of Effective Treatment	No Support in Home Country	Relocation Results in Shortening of Life	Mental / Physical Suffering	Unique	Holding
D v. UK (1997)	✓	✓	✓	✓	✓	-	Granted
UKIAT 03905 (2002)	⊘	✓	✓	-	-	-	Denied
UKIAT 08004 (2003)	⊘	⊘	⊘	⊘	-	-	Denied
UKIAT 00015 (2003)	⊘	✓	⊘	✓	-	-	Denied
UKIAT 00018 (2004)	⊘	⊘	⊘	✓	-	-	Denied
UKIAT 00096 (2004)	⊘	✓	✓	✓	-	-	Denied
UKIAT 00262 (2004)	⊘	✓	✓	✓	-	-	Denied
UKIAT 00267 (2004)	⊘	✓	✓	✓	-	-	Denied
UKIAT 00077 (2005)	⊘	✓	✓	✓	-	-	Denied
N v. SSHD (2005) UKHL 31	⊘	✓	✓	✓	-	-	Denied
ZT v. SSHD (2005) EWCA 1421	⊘	✓	✓	✓	✓	⊘	Denied
GS v. SSHD (2006) EWCA 198	✓	✓	⊘	✓	⊘	-	Denied
BK v. SSHD (2008) EWCA 510	✓	✓	✓	✓	✓	⊘	Denied
N v. UK (2008)	⊘	✓	✓	✓	-	-	Denied

[213] These symbols designate the presence of factors in each case and not the immigration authorities' perspective as to their validity. For example, a case where a shortening of life was likely yet held as irrelevant by the immigration authority would result in an affirmative check mark. Negative marks denote instances where the immigration authority noted the absence of the factor. Dashes represent instances where the factor was not discussed.

1. *HIV-Based Article 3 Humanitarian Protection*

As noted above, all HIV-based claims found were articulated as Article 3 claims for humanitarian protection. From the ECHR, Article 3 states that "[no] one shall be subjected to torture or to inhuman or degrading treatment or punishment."[214] The pertinent part for HIV-based claims being "inhuman or degrading treatment." Though these words are not ambiguous, their meaning as applied to HIV-based Article 3 claims has evolved over time. The current framework for Article 3 based humanitarian protection in the U.K. is laid out in *N v. SSHD* as:

> [W]hether the applicant's illness has reached such a critical stage (i.e. *he is dying*) that it would be inhuman treatment to *deprive* him of the care which he is currently receiving and send him home to an early death *unless there is care available to enable him to meet that fate with dignity*.[215]

The result is a framework that outlines two main considerations: first, that the applicant is near death, and second that the applicant would be unable to meet their death with dignity if removed. This framework was recently affirmed by the ECtHR in *N v. UK*,[216] and is currently promulgated by the UK Border Agency as official guidance for all medically related Article 3 claims.[217]

The near-death requirement has been interpreted strictly as a present-tense condition.[218] Claimants who are currently healthy due to medical care available in the U.K. but would soon die if removed do not satisfy this requirement.[219] Though the irony of this logic is not lost on the courts, it has remained the law.[220]

---

214. ECHR, *supra* note 56, art. 3.

215. N v. SSHD [2005] UKHL 31, [2005] 2 AC 296, ¶ 69 (U.K.) (emphasis added).

216. N v. UK, [2008] ECHR 453 ,¶ 42 (affirming the holding in *N v. SSHD* that the exceptional circumstances in *D. v. UK* which triggered the Article 3 violation was the critical stage of the claimant's illness, as well as the lack of any food, shelter, or social support upon return).

217. *See generally* European Convention on Human Rights Policy Instructions, *supra* note 211.

218. UK Rwanda [2004] UKIAT 00262 (Eng.) (involving an HIV-positive Rwandan woman with "extremely poor" health and no prospect of treatment in Rwanda who was denied humanitarian protection, and the AIT held that the woman's current condition was not so severe as to be "near death").

219. *Id.*

220. *See, e.g.*, N v. SSHD [2005] UKHL 31, ¶¶ 49, 53 (Eng.) (As part of the majority decision, Lord Hope noted that "(i)t appears to be somewhat disingenuous for the court to concentrate on the applicant's state of health which, on a true analysis, is due entirely

Whether care is available to enable a person to meet death with dignity is measured on the basis of available medical treatment, and familial and other social support.[221] The threshold for available medical treatment is very low. Treatment is deemed available so long as it exists in the home country, regardless of financial limitations,[222] general supply constraints,[223] or actual effectiveness for the claimant.[224] Indeed, merely palliative treatment is sufficient to afford a person dignity in death and deny an Article 3 based claim.[225] The threshold for familial and other social support is also very low. The existence of any family regardless of their financial ability or emotional desire to provide assistance is sufficient.[226] Where clear animosity by the family is shown, a claimant who is currently in stable condition is assumed to be able to "develop private life relationships with others."[227] Whether such an

---

to the treatment whose continuation is so much at risk." Yet even after acknowledging the more fundamental moral point, Lord Hope concludes with his hand forced by fear, stating that to adopt a different standard would result in financial consequences too great to bear. To consider the future likely death of a claimant as persuasive "would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely ... . This would result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the states parties to the convention would ever have agreed to.").

221. *Supra* note 61, at 15.

222. UK Rwanda [2004] UKIAT 00262 (Eng.) (involving an HIV-positive claimant from Rwanda who introduced evidence that such low supply and high cost of HIV medication would prevent claimant from actually obtaining treatment, even if costs were drastically cut, but the tribunal held that Article 3 did not provide a guarantee for "wholly free availability of ARV drugs," and denied remand).

223. *See id.*

224. *See, e.g.*, Shereni v SSHD, [2006] EWCA (Civ) 198, 2006 WL 755451 (Eng.) (HIV-positive claimant from Zimbabwe had already developed resistance to common retro-viral medication and was currently taking specialty medication. Zimbabwe was shown to have some HIV medication but none suitable for claimant. Court held that availability of HIV treatment was sufficient to satisfy Article 3).

225. *See, e.g.*, VP v. SSHD [2004] UKIAT 00267 (Eng.) (explaining that an HIV-positive claimant from Vietnam showed that there was no HIV treatment available in Vietnam, only palliative treatment, and removal would result in death without family or other social support, so the AIT held that treatment center offering palliative treatment was sufficient to satisfy obligations under Article 3).

226. Jamaica v. SSHD [2004] UKIAT 00096, *available at* http://www.unhcr.org/refworld/docid/43fc2d620.html (explaining that a homosexual HIV-positive man from Jamaica was thrown out of his home at the age of 17, and again by his aunt when she learned of his homosexuality, and though claimant was able to show general hostility towards homosexuals in Jamaica and that there were no family or friends who would support him, the AIT held that there was no reason claimant could not make new friends).

227. *Id.*

individual would still be able to develop such relationships when denied medical care and suffers a severe deterioration in health has not yet been considered.

Two other arguments were often raised by claimants: that removal would lead to a drastic shortening of their life, and that removal would result in severe mental and physical suffering. This is due to the fact that these two elements were present in *D v. UK* and were compelling factors in the Court reaching its holding in that case.[228] *D v. UK* was a landmark case, preceding *N v. UK* by over a decade, and first set the stage for Article 3 based humanitarian protection claims related to medical care.

The Court held in *D v. UK* that the claimant's near-death status combined with a dramatic shortening of life, acute mental and physical suffering, absolute lack of medical treatment or family or social support if returned to St. Kitts constituted "exceptional circumstances" under which "the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of Article 3."[229]

Unfortunately, the Court declined to provide an exact account of which of these factors were required, which optional, and if some were optional how they were to be weighted. The next ten years would reveal an ever constricting interpretation of *D v. UK* that continues to the present day. At present neither a drastic shortening of life, nor severe mental and physical suffering are relevant in Article 3 based claims. While a dramatic shortening of life enjoyed some discussion subsequent to *D v. UK* recent cases make clear that even a dramatic shortening of life due to removal is no longer compelling.[230] Similarly, where mental and physical suffering is mentioned at all it is mentioned as a sad but unavoidable reality, not relevant to the analysis of an Article 3 claim.[231]

---

228. *See* D v. UK, App. No. 30240/96, 24 Eur. H.R. Rep. 423, ¶¶ 51, 52 (1997) (noting that as part of overall finding of exceptional circumstances, the abrupt withdrawal of medical care would dramatically hasten claimants death), *available at* http://www.unhcr.org/refworld/docid/46deb3452.html.

229. *Id.* ¶¶ 51-53.

230. *See* [2005] UKIAT 00077. An HIV-positive Ghanaian woman was suffering from advanced case of AIDS, and "removal would reduce Appellant's life expectancy to between 6 and 12 months, before an agonizing death." *Id.* ¶ 17. However, the Tribunal held that shortening of life was not a relevant factor in Article 3 claims. *See also* N. v. UK, [2008] ECHR 453, ¶ 42 (noting that "[t]he fact that the applicant's circumstances, including his life expectancy, would be dramatically reduced if he were to be removed...is not sufficient in itself to give rise to a breach of Article 3").

231. *See* EWCA (Civ) 510 (noting that the claimant who will suffer extreme suffering

Sadly, two recent cases seem to have introduced a new requirement of uniqueness to the standard Article 3 analysis. Since *D v. UK* first articulated Article 3 as involving "exceptional" circumstances, cases have turned on what factors were in fact exceptional.[232] Through the years it seems the original words of Article 3 itself have been forgotten as these recent cases have reinterpreted the term "exceptional" as requiring uniqueness.[233] Claimants who satisfy all the legal requirements for Article 3 based humanitarian protection as established by *N v. SSHD*, have been denied relief due to the fact that their circumstances were not unique, but potentially shared by many in their home country.[234] Though this interpretation has no support in the text of Article 3 itself, nor in the currently promulgated standard set forth in *N v. SSHD*, these cases have not yet been overturned.

a. D v. United Kingdom

Over a decade ago, *D v. UK* established new ground for Article 3 based humanitarian protection claims. The right of States to control their borders and exclude those it wishes is as well established as the existence of States themselves. Yet in granting D's Article 3 claim, the ECtHR held that it would take seriously the absolute, non-derogable nature of the rights established in the ECHR.

Unfortunately, despite *D v. UK*'s groundbreaking nature few cases would be able to repeat its success. Indeed, eight years later *N v. SSHD* would virtually close the door to *D v. UK* type Article 3 based claims. However, *D v. UK* itself remains good law and serves as the marker of where these cases began.

Case Summary

D v. UK involved an HIV-positive man from St. Kitts, a small two-island nation in the Caribbean. In August of 1994, D was serving time in a British penitentiary when he suffered an attack of pnuemocystis

is the product of "a world where there is abject poverty and healthcare," a situation not unique, thus denying humanitarian protection), [2008] EWCA (Civ) 198 (explaining that the claimant will likely die soon after returning to home country, but as drugs are available to alleviate pain of death, there was no Article 3 violation), [2004] UKIAT 00267 (explaining that there was no HIV/AIDS treatment available, but palliative treatment was enough to satisfy Article 3).

232. *See* D. v. UK, App. No. 30240/96, 24 Eur. H.R. Rep. 423, ¶¶ 51-53.

233. *See* BK v. SSHD [2008] EWCA (Civ) 510 (2008 WL 2033428); ZT v. SSHD [2005] EWCA (Civ) 1421 (2005 WL 3114462), ¶ 23.

234. BK v. SSHD [2008] EWCA (Civ) 510 (2008 WL 2033428).

carinii pneumonia and was diagnosed as HIV-positive.[235] Having entered the country without proper documentation, immigration authorities had sought to remove D immediately after his release on January 20, 1996.[236] However, with the help of his solicitors, D requested leave to remain in the U.K. on compassionate grounds.[237] With few medical resources available in St. Kitts, it was argued that removal would effectively deny D any chance of continuing the medical treatment that was keeping him alive.[238] D's request was denied, the immigration authorities stating that it would be unfair to provide treatment to D at public expense.[239] On February 2, 1996 D applied to the High Court for judicial review, and was denied.[240] On February 15, 1996 D again appealed – now to the Court of Appeal – and again was denied.[241] D then appealed his case to the ECtHR.[242]

By this time D's medical condition had deteriorated significantly.[243] His CD4 cell count had been below 10 for over a year and he was suffering from "anaemia, bacterial chest infections, malaise, skin rashes, weight loss and periods of extreme fatigue."[244] D was "reaching the end of the average durability of the effectiveness of the drug therapy which he was receiving," and his life expectancy was estimated at eight to twelve months.[245] Without treatment it was estimated that D's life expectancy would be reduced by half.[246]

A letter from the High Commission for the Eastern Caribbean States stated that St. Kitts did not have the medical capacity to treat D's HIV.[247] A letter from the Red Cross stated that St. Kitts in fact had no medical capacity to treat HIV or AIDS.[248] As D's mother had already emigrated to the U.K. to care for him, D had no home or family left in

235. D v. UK, ¶ 8.
236. *Id.* ¶ 10.
237. *Id.* ¶ 11.
238. *Id.*
239. *Id.*
240. *Id.* ¶ 12.
241. *Id.*
242. *Id.*
243. *Id.* ¶ 13.
244. *Id.*
245. *Id.* ¶ 15.
246. *Id.*
247. *Id.* ¶ 16.
248. *Id.* ¶ 17.

St. Kitts.[249]

In its holding, the court first notes that all States generally have the right to control the entry, residence, and expulsion of aliens.[250] However, the court also notes that "in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention (art. 3) [which] prohibits in absolute terms torture or inhuman or degrading treatment or punishment."[251]

Recognizing that Article 3 had in the past typically been applied to persons facing risk of intentional acts perpetrated by public authorities, the court held as follows:

> [G]iven the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article 3 in other contexts which might arise. *It is not therefore prevented from scrutinizing an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone do not in themselves infringe the standards of that Article 3.* To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection.[252]

The court acknowledged that it was doing something new. It recognized that though the various aspects of D's suffering are not the intentional acts of any government, nor the indirect responsibility of any public authority, nor even sufficient to infringe Article 3 if viewed individually, taken as a whole they warrant a serious analysis and may constitute an Article 3 violation.[253]

The court then held that D's near-death status combined with a dramatic shortening of life, acute mental and physical suffering, and absolute lack of medical treatment or family or social support if returned to St. Kitts constituted "exceptional circumstances" under which "the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of Article 3."[254] How many of these elements were necessary, or how they should be weighted, the Court unfortunately did not say.

---

249. *Id.* ¶ 18.
250. *Id.* ¶ 46.
251. *Id.* ¶ 47.
252. *Id.* ¶ 49 (emphasis added).
253. *Id.*
254. *Id.* ¶¶ 51-53.

b. VP v. SSHD

VP v. SSHD, [2004] UKIAT 000267, is representative of the cases which occurred after *D v. UK,* but before *N v. SSHD [2005] UKHL 31.* These cases were factually similar to *D v. UK* in all respects except that the claimants were not in a near-death condition. It was on this crucial difference that these cases were distinguished from *D v. UK* and were denied. The claimant in this particular case had no family or social support waiting for him in his home country, no prospect of medical treatment, and would suffer a dramatic shortening of life if removed, yet at the moment of adjudication enjoyed relative health due to the medical treatment provided to him while in the U.K. On this basis, he was denied protection.

Case Summary

This case involved a young HIV-positive man from Vietnam who sought asylum and humanitarian protection under Article 3 of the ECHR.[255] Denied both at the Adjudicator level, he appealed his case to the AIT.[256]

Though the claimant was HIV positive, at the time of the tribunal's decision he had achieved "good control over his HIV disease."[257] Without treatment, however, the claimant's chances of survival over three years was estimated to be 5%.[258] With treatment the claimant's chances of survival for three years was estimated at 95%.[259] The claimant had no known family in Vietnam or in the U.K.[260] Evidence was introduced of a HIV treatment center in Vietnam, the Binh Trieu center in Ho Chi Minh City.[261] This center was established as the only care center available for AIDS patients in Vietnam.[262] However, no actual medical care was available at the center, only palliative care to ease a patient's pain and suffering.[263] In deciding the case, the AIT turned to the standard laid out in *N v. SSHD [2003] EWCA Civ 1369,* which stated that relief could be granted only when "[it] is arguable that

255. VP v. SSHD [2004] UKIAT 00267, ¶ 1.
256. *Id.*
257. *Id* ¶ 4.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* ¶ 5.
262. *Id.*
263. *Id.*

the humanitarian appeal of the case is so powerful that it cannot be resisted by authorities of a civilized state."[264]

The AIT held that the facts of this case did not satisfy the above standard as they were less favorable than those in *N v. SSHD [2003] EWCA Civ 1369* where N enjoyed no available treatment centers. The Tirbunal also distinguished VP's situation from the claimant in *D v. UK.* Here, the claimant had some prospect for survival in the medium term whereas D did not.[265] For the aforementioned reasons, the AIT dismissed the case.[266]

c. N v. Secretary of State for the Home Department

N v. SSHD [2005] UKHL 31 solidified the near-death requirement that had been developed in recent cases. Though the Court in *D v. UK* had noted that the claimant there was near death, it was only one of a host of factors found in the aggregate to amount to an "exceptional" circumstance, warranting humanitarian protection.[267] By *N v. SSHD [2005] UKHL 31,* it had become an essential factor without which no Article 3 based claim could succeed.

As a case before the House of Lords there is no single majority opinion, rather each of the five appellate committee members issues an individual opinion. The holding is whatever consensus arises from these opinions. In this case, the standard articulated by Lord Hope and Baroness Hale, and accepted by Lord Brown, is accepted as the majority holding and is promulgated by the UK Home Office as the test for medical illness claims of Article 3 based humanitarian protection.[268] As noted above, the standard is essentially that the claimant is so close to death that it would be inhuman to send him away, "unless there is care available to enable him to meet that fate with dignity."[269]

The cruel irony is that such a rule penalizes claimants for obtaining the life saving treatment they seek to preserve with their claim. If an HIV-positive claimant seeks medical care and maintains relative health he will fail to satisfy the near-death requirement and be denied protection. Even if a claimant arrives in the U.K. in a near-death condition and is then eligible for protection, by the time the claimant is

264. *Id.* ¶ 1(citing N v. SSHD, [2003] EWCA (Civ) 1369, ¶ 40).
265. *Id.* ¶ 6.
266. *Id.*
267. *Supra* note 232.
268. *Supra* note 54.
269. *Supra* note 215.

before the AIT or Supreme Court their condition will likely have stabilized rendering them subject to removal.

Case Summary

N v. SSHD [2005] UKHL 31 was a case involving a Ugandan woman who had entered the U.K. on March 28, 1998.[270] She had entered with false documents but was seriously ill upon entry and was taken to a hospital where she was diagnosed as HIV positive.[271] By August N had developed Kaposi's sarcoma – an AIDS defining illness – and had a CD4 count of 10.[272] A report issued by N's doctor stated that "[w]ithout active treatment 'N's' prognosis is appalling. I would anticipate her life expectancy to be under twelve months if she were forced to return to Uganda, where there is no prospect of her getting adequate therapy."[273]

At the first adjudicator level, N brought claims of asylum and protection under Articles 3 and 8 of the ECHR. The adjudicator dismissed N's claims of asylum and protection under article 8, but found that N's case for Article 3 protection was "overwhelming."[274] The adjudicator noted existing policy guidance from the Home Office regarding medical Article 3 claims, then still based on *D. v. UK*, which advised that claimants who would suffer a shortening of life and acute physical and medical suffering upon removal should be granted protection.[275] Having "no doubt that all the requirements of this paragraph [referring to policy guidance on medical Article 3 claims] have been met in this case .... I find that the implementation of the respondent's decision to return the applicant to Uganda would be a breach of her Article 3 rights."[276]

The case was then appealed to the AIT where N's removal was found acceptable.[277] The AIT found evidence of HIV treatment that was becoming available in Uganda, and held such as sufficient grounds to distinguish N's case from that of *D. v. UK* and thus not a violation of

270. N v. SSHD [2005] UKHL 31, ¶ 2.
271. *Id.* ¶ 3.
272. *Id.*
273. *Id.*
274. *Id.* ¶ 5.
275. N v. SSHD, [2003] EWCA (Civ) 1369, ¶ 11.
276. *Id.*
277. *Id.* ¶¶ 13, 21.

Article 3.[278] N argued that her growing resistance to basic anti-retroviral medications rendered the potential treatment in Uganda ineffective.[279] The AIT found that argument speculative in light of the ever changing nature of HIV medication.[280] N argued that the treatment available in Uganda was prohibitively expensive and that she would be unable to afford it.[281] The AIT found that the relevant factor was the availability of medical treatment, not its cost or effectiveness.[282] Accordingly, the AIT found that "for the respondent to be returned to Uganda would not be a breach of Article 3."[283]

N then appealed her case to the Court of Appeal where she argued that the AIT "failed to confront unimpeachable findings of fact made by the Adjudicator in the appellant's favor."[284] The court agreed that the AIT had provided lackluster legal reasoning in its decision, but held by a majority that N's case would fail even if taken at its most positive, as it did not satisfy the "extreme" requirements of Article 3. The court dismissed N's case.[285]

N appealed again, now to the UK House of Lords.[286] Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Walker of Gestinghorpe, Baroness Hale of Richmond, and Lord Brown of Eaton-under-Heywood provided their opinions concerning the case. The majority held that the requirements set by *D v. UK* for Article 3 protection were very exceptional, requiring applicants to be near death with no prospect of treatment or care if returned to their home country. An analysis of each opinion follows.

Lord Nicholls of Birkenhead noted in his opinion that the logic underlying *D v. UK* was flawed. While the ECtHR held that D was entitled to humanitarian protection due under Article 3 due to his exceptional circumstances, in truth the circumstances of D's life were not exceptional at all in comparison to the lives of many who suffer from HIV and AIDS.[287] In this respect, Lord Nicholls of Birkenhead

278. *Id.* ¶ 20.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at ¶ 21.
283. *Id.*
284. *Id.* ¶ 7.
285. *Id.* at 43, 49.
286. N v. SSHD, [2005] UKHL 31, ¶ 1.
287. *Id.* ¶¶ 12, 13.

held that the humanitarian holding of *D v. UK* was simply unclear. What was clear, however, was the ECtHR's holding in *D v. UK* that States do not have a duty to pay for the medical care of illegal aliens, which is what Lord Nicholls believed the focus of these cases should be.[288] Under this rationale, Lord Nicholls, joining with Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood, expressed his opinion to dismiss the appeal.[289]

Lord Walker of Gestinghorpe, in a one paragraph opinion, stated his agreement with the aforementioned opinion and stated that the applicant's circumstances were not exceptional and the appeal should be dismissed.[290]

Baroness Hale of Richmond noted that not even the ECtHR itself had, since *D v. UK*, granted Article 3 in a number of other medically related cases, even in circumstances arguably more dire than that in *D v. UK*.[291] In this respect, Baroness Hale of Richmond suggested that perhaps the ECtHR had recognized that it had been overgenerous in *D v. UK* and had since been undertaking to quietly correct its past mistake.[292] In regards to the core issue of the case the Baroness stated that the test should be:

> whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity.[293]

Baroness Hale acknowledged that this test is effectively the same as that of Lord Hope of Craighead.[294] Under this test, Baroness Hale held that the applicant failed to establish a claim for Article 3 protection and that the appeal should be dismissed.[295]

Lord Hope of Craighead expressed his opinion that the proper test for Article 3 medical cases should be whether "the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked

---

288. *Id.* ¶ 15.
289. *Id.* ¶ 19.
290. *Id.* ¶ 55.
291. *Id.*¶¶ 65-70.
292. *Id.* ¶ 63.
293. *Id.* ¶ 69.
294. *Id.*
295. *Id.* ¶ 70.

the medical and social services which he would need to prevent acute suffering while he is dying."[296]

Similar to Baroness Hale, Lord Hope acknowledged that this standard was effectively the same as that of the Baroness'. Under this standard, Lord Hope held that the applicant's currently stable condition allowed for removal without violating Article 3.[297]

Lord Brown of Eaton-under-Heywood noted, at great length, the internal debate and subsequent discussion at the ECtHR concerning the impact and future role of *D v. UK*.[298] Lord Brown's conclusion was that the ECtHR had come to adopt a "restrictive line" to the case which limited its holding, as opposed to a "liberal line" which may have established an absolute right of medical care for seriously ill persons.[299] With this understanding in mind, Lord Brown accepted Lord Hope of Craighead's test and similarly concluded that the applicant did not satisfy the requirements for Article 3 protection.[300]

d. BK v. SSHD

In the wake of *N v. SSHD [2005] UKHL 31*, a further restriction appeared on Article 3 based claims–the requirement of uniqueness. As noted above, Lord Nicholls of Birkenhead stated in his opinion in that case that the logic of the ECtHR in its reasoning in *D v. UK* was flawed. Specifically, Lord Nicholls argued that while the ECtHR had stated that D's situation warranted protection due to D's exceptional circumstances, in fact D's circumstances were quite similar to many others who suffer from HIV in the underdeveloped and developing world.[301] In doing so, Lord Nicholls introduced the concept of uniqueness to the existing definition of "exceptional" as required by *D v. UK*. Though not a part of the commonly cited majority, Lord Nicholls's opinion still stands part of the House of Lord's ruling, and

296. *Id.* ¶ 50.

297. *Id.* ¶ 51.

298. *Id.* ¶¶ 80-89.

299. *Id.* ¶ 89.

300. *Id.* ¶¶ 97-98. N subsequently appealed her case to the ECtHR where it was heard by a Grand Chamber of 17 Judges, fourteen of whom affirmed the holding in N v. SSHD [2005] UKHL 31 for largely the same reasons as the House of Lords. Judges Tulkens, Bonello, and Spielmann dissented, arguing that the protections secured by the ECHR were non-derogable, and had previously been held as such by the Court even in the face of social or economic hardship. To excuse the protection of an ECHR right out of fear of economic cost would undermine the authority of the ECHR itself.

301. N v. SSHD [2005] UKHL 31, ¶ 1.

thus the requirement of uniqueness was born.

Later that same year this new requirement for uniqueness arose again in *ZT v. SSHD [2005] EWCA 1421*, where the Court of Appeal was considering an appeal from the AIT involving a humanitarian protection claim denied to a Zimbabwean woman. It was there that the Court introduced a new requirement based on the plain meaning of "exceptional." The Court noted the following:

> It is only fair to the IAT[302] to remind ourselves that they *were at least in part addressing an exorbitant submission on behalf of Ms. ZT that her case was unique.* The unreality of that contention was demonstrated by the very large numbers suffering from HIV in Zimbabwe.... Once she had failed to demonstrate any significant difference between the position in Zimbabwe and that in other countries, then it was relevant to consider whether she would be in a different position from other AIDS sufferers in Zimbabwe. No attempt was made to demonstrate such a difference to the IAT, as they were correct to record.[303]

In April of 2008 *BK v. SSHD [2008] EWCA Civ 510* involved a claimant whose circumstances fulfilled all the legal requirements of an Article 3 claim set out in *N v. SSHD [2005] UKHL 31*, yet the court denied his claim specifically due to the lack of uniqueness of the claimant's situation.[304]

Case Summary

BK v. SSHD involved an HIV-positive Zimbabwean man seeking protection under asylum and humanitarian protection.[305] BK entered the U.K. in 1999 and remained illegally.[306] In 2002 BK was diagnosed

---

302. The Asylum and Immigration Tribunal is sometimes referred to as the Immigration and Asylum Tribunal, abbreviated as IAT. They are the same government entity. As of February 2010, the IAT was superseded by the First-tier Tribunal Immigration and Asylum Chamber (FTTIAC). Tribunals Service, Immigration and Asylum, http://www.tribunals.gov.uk/ImmigrationAsylum/AboutUs/AboutUs.htm (last visited Feb. 20, 2010).

303. ZT v. SSHD, [2005] EWCA (Civ) 1421, ¶23 (emphasis added).

304. BK v. SSHD, [2008] EWCA (Civ) 510. It must be noted at this point that neither the text of the ECHR itself, nor the ECtHR in D. v. UK or N. v. UK, contain any consideration of uniqueness in their discussion of Article 3-based claims. The term "exceptional" was first coined by the ECtHR in D. v. UK as a means of classifying the severity of harm that would constitute "inhuman or degrading treatment," as defined by Article 3 itself. By re-interpreting the term "exceptional" outside of this context, the UK has bastardized the term and its analysis of Article 3 based claims.

305. *Id.* ¶ 1.

306. *Id.*

with HIV and began various treatment regimens.[307] In 2004 BK applied for asylum on the grounds that he would be persecuted on account of past affiliation with the MDC political party in Zimbabwe, and humanitarian protection on the grounds that his removal would deny him life saving medical treatment violating Articles 3 and 8 of the ECHR.[308]

The Adjudicator denied both of BK's claims due to a lack of credibility.[309] However, an appeal was granted on the grounds that the Adjudicator had misunderstood some of BK's evidence concerning the availability of treatment for HIV in Zimbabwe.[310]

BK provided expert testimony that HIV treatment would be impossible for him to obtain due to reasons of cost, availability, and accessibility.[311] BK also provided evidence as to the mental and physical anguish he would suffer due to a lack of medication, including those from AIDS defining illnesses such as TB, acute pneumonia, blindness and mental confusion.[312]

The Adjudicator held that though he was aware that BK

> will die and in the most appalling circumstances of pain, indignity and in all likelihood confused terror ... no one with any sense of human decency could help feeling pity for him in his circumstances and revulsion at his possible plight .... *[S]adly there are a very large number of people in Zimbabwe and in the world at large that do face this fate.* It is a consequence of living in a world where there is abject poverty and poor healthcare.[313]

Finding that "[i]t is the poor healthcare in Zimbabwe that is the problem," the Adjudicator dismissed BK's appeal under Article 3.[314]

On appeal to the AIT, BK raised numerous objections centered around the Adjudicator's failure to understand the severity of the harm BK would incur if removed to Zimbabwe. The AIT dismissed all of these claims, noting that the Adjudicator

> was as alive as I am to the horrific nature of this case. A tragedy of truly epic proportions has struck Saharan Africa. Approximately 25%

307. *Id.*
308. *Id.* ¶ 2.
309. *Id.*
310. *Id.* ¶ 3.
311. *Id.* ¶ 5.
312. *Id.*
313. *Id* (emphasis added).
314. *Id.*

> of the population of Zimbabwe suffers from HIV AIDS .... *Sadly the plight of the appellant is far from unusual.* The case law makes it clear that it is only in an *exceptional and extreme* case that a claim will succeed under Article 3 or 8.[315]

For the reasons above, the AIT dismissed BK's appeal.

IV. Conclusion

The current application of asylum and refugee law in both the U.S. and the U.K. offers limited protection to persons with HIV. In the United States, asylum's unique requirement of proving the persecutor's motivation severely limits a claimant's case. Similarly, the U.K.'s requirement that a claimant be near death and that their suffering be unique effectively bars all Article 3 based claims for humanitarian protection. Both of these interpretations are arguably incorrect, aberrations from the norm created due to financial and social fears. They represent a step back from the belief that those who suffer without just cause should be protected. Fortunately, they can be changed; there is something we can do.

315. *Id.* ¶ 17 (emphasis added).